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IN THE

Supreme Court of the United States

1948 TERM

No. 639

ROY C. METZGER, *Petitioner,*

vs.

HANNAH HOSSACK, as Administratrix of the Estate of James W. Hancer, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

Roy C. Metzger, the Petitioner above named, prays that a Writ of Certiorari issue to review the Judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered January 8, 1948, in the case of Roy C. Metzger, Appellant, vs. Hannah Hossack, as Administratrix of the Estate of James W. Hancer, Deceased, Appellee, which Judgment affirmed the Judgment of the United States District Court for the District of South Dakota, Western Division, the Judgment of said District Court being in favor of the Respondent and against the Petitioner.

OPINION BELOW

The Circuit Court of Appeals by its decision affirmed the Judgment of said District Court and reaffirmed its decision in the same case on a former appeal taken by the present Respondent to the Circuit Court of Appeals, when the District Court directed a verdict in favor of your Petitioner and against the present Respondent. See for first opinion, 156 Fed. 2d 501. That opinion remanded the case for a trial by jury.

The first trial was at the October, 1945, term of the District Court, when a verdict was directed (R. 11).

(References herein to the Printed Record are referred to by the letter "R".)

On reversal a second trial was had in the District Court at the October, 1946, term, resulting in a verdict in favor of Respondent (R. 12). Petitioner filed a motion for new trial. The verdict and judgment were set aside by the Court on January 31, 1947 (R. 12). Before the third trial there was an Amended Answer, as appears (R. 5). The third trial was had at the March, 1947, term of the District Court, resulting in a verdict and judgment in favor of Respondent (R. 12). From that judgment there was an appeal by Petitioner to the Circuit Court of Appeals. The decision sought to be reviewed is the opinion rendered in the first and last appeals. The Judgment of the Circuit Court of Appeals is on the merits and final, so far as concerns the United States Circuit Court of Appeals, except that Petitioner herein duly made an application for rehearing. This application for rehearing was denied on the 5th day of February, 1948, whereby proceedings in the United States Circuit Court of Appeals have been terminated and nothing remains to be done in said Court.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, being Section 347 (a) of Title 28 of United

States Code Annotated, and subsequent Amendments and Rules of this Court, particularly Rule 38 of the United States Supreme Court Rules.

SUMMARY STATEMENT OF FACTS AND MATTERS INVOLVED

This action presents a unique claim of alleged negligence. Suit was brought by Respondent under the South Dakota Wrongful Death Statute, Chapter 32.22 SDC 1939. All parties in interest were residents of South Dakota when the alleged cause of action arose. The widow of decedent was appointed administratrix in South Dakota, but did not commence the action. She resigned and had a non-resident sister-in-law appointed administratrix, so as to bring the action in Federal Court under the provisions relating to diverse citizenship.

Respondent's claim is predicated on the alleged negligence of one Ritter (commonly called Harry), a 63-year-old trainee selected by decedent Hancer, to train as a projectionist in Appellant's moving picture theatre located at Gregory, South Dakota. Trainee worked without pay under decedent's direction, doing some of decedent's work in hopes of securing a job at the theatre as a projectionist when decedent quit his job. Before the trainee could get the job he had to have the approval of Appellant, which approval had not been given.

On October 28, 1943, while decedent was the projectionist in the fireproof projection room in said theatre, he directed the trainee Ritter to rewind a film that had just been used. It is claimed in paragraph VII of Respondent's Amended Complaint (R. 4-5) that the film in the hands of the trainee (alleged co-employee) became ignited near the end thereof. (There is no claimed negligence against the owner appellant or trainee because of the ignition of the film.) The only negligence claimed is that the trainee could have put out the fire in a matter of a couple of seconds; that instead, while being burned by the film flash fire, he threw the burning film through an open door of the projection room, blocking the egress of decedent, thus causing decedent's death by the film fire.

The defenses, in the main, were that the fire originated from a cigarette smoked by decedent, in violation of rules and regulations and South Dakota state law (Sec. 31.0412 SDC 1939), for his personal pleasure and outside the scope of decedent's employment; that Ritter was not a co-employee for whose acts Appellant was responsible; that the fire for the origin of which there is no claimed negligence, was the proximate cause of decedent's death; that Ritter's acts or omissions were but incidents brought about by the fire which was the proximate cause; that Ritter was placed in a perilous position, with his life in danger, by no act of his and that he had to act in an emergency and in a matter of seconds, and that his acts or omissions, under the circumstances, were not negligent acts; that what occurred was an unavoidable accident that could not be foreseen or guarded against (See Answer, R. 5 to 10).

There were only two witnesses to what occurred—Ritter, the trainee, and decedent's widow, the real party in interest. From the legal standpoint, there is no material difference in their testimony. The vital testimony of both is brief. We summarize and quote from the widow's testimony:

Decedent was the only cigarette smoker in the hallway or projection room the night of the fire. "My husband was a cigarette smoker. * * * There could have been some cigarette stubs around this ash tray the night of the fire (R. 26-27). * * * Sometimes there would be just three or four feet (referring to the loose end of the film) and it would flop over the end of the table near the door * * *." "Q. And it would go over in the general vicinity of where this ash tray was, wouldn't it?" "A. Yes. I imagine in the general vicinity."

"It was sort of dark down there where I saw this spark (referring to the ignited film). It was about three inches from the end of the film. It was a red spot. It looked sort of like a little piece of coal or something that you will see fall on a newspaper and make a little sort of ring. I don't remember any smoke. When I saw this, Harry was busy

with the large reel. He had it in his hand and had stepped back from the rewind table and was holding the reel with one hand and trying to roll it up with the other, and the loose end of the film, when holding the reel in his left hand, would be running through his right hand and that was the process that was going on at that particular time. I don't know the actual time when the film got this spark of fire. I didn't see it until it was near the floor. When I saw it, it was a red spark. At that time, Harry's back was towards the projection machine. His face was toward the rewind table and I was at his right. I spoke loud enough so that Harry could hear because I saw him look down. I think I spoke in an ordinary tone of voice. At that time Harry was holding the spool in one hand and pulling it around so the film came up through his right hand." (R. 28).

The words spoken were, "Harry, your film is on fire, tear it off." (R. 20). The witness also said when she spoke she was three or four feet from Ritter (R. 20). She likewise estimated the time from when she saw the spark until the fire flashed was from twelve to fifteen seconds. This was only a guess (R. 21). The same witness has a personal action pending for $50,000.00, growing out of the same transaction (R. 23). She likewise testified that this spot of fire had to go through Ritter's hand before it could reach the reel. She did not know whether Ritter tried to pull the film lengthwise and put out the fire (R. 29). "I did see his hands after the fire and his right hand was very severely burned. When I saw this flash, Harry threw the reel out the doorway and the entire film went out in the hallway." (R. 29). She likewise testified, "When it hit, it gave a louder burst and in another second, a much louder one, and then the fire was five or six feet high, covering the doorway." (R. 21).

When the fire was extinguished, decedent's body was found, not in the projection room, but in the hallway, several feet from the doorway to the projection room.

This same witness, the night of the fire and afterwards, told the City Fire Marshal, the Deputy State Fire Marshal,

nurses at the hospital, her own doctor, the Methodist minister and others that the fire started from her husband's cigarette (R. 64, 66, 87, 90, 91, 92 and 93). In the main, there was no denial of this testimony except, "I cannot remember."

Ritter's testimony was to the general effect that he had a full spool and reel in his left hand, the diameter of the reel being about fourteen inches and the weight of the film and reel being twelve pounds (R. 57 and R. 55), at the time the widow called his attention to the fire. He testified, "I had never had any training or experience in tearing film. I never tore one or seen one torn and never had any training or experience of any kind in the matter of putting out a film fire. When she made that remark I was busy. I was facing south or west. After she made that remark I turned. The end of the film was hanging over the end of the table. When she made that remark it pulled off the table. I had it in my hand here. I was taking it off the rewind machine when she told me that, and it pulled off the end of the table and the end was hanging down. I don't know how far it was from the floor. When I succeeded in looking at it, I seen the spot of fire, the size of a dime, or smaller. It was spreading. I tried to smother it out. I took my hands and pulled the roll of film through my hands. I don't know whether I turned the roll up to get closer to it or not. I could not tear it. I only had one hand. I had the roll in one hand and this one was around the film. The roll was in my left hand and I was turning it this way with the other, pulling it through my right hand. When it turned up it came through my right hand. I pulled it. When I reached this spot of fire it was flaming. It was hot. Before this fire my hands were perfectly good. I had no crippled fingers, no burns on my hands. * * * Just then it flashed."

"Q. Did you do everything you know how to put it out?

"A. I sure did." (R. 57-58).

He estimated that from the time he saw the spot until it burst into flame was around five seconds (R. 58). The un-

disputed evidence of chemists and others who used stop watches was that when there was a spot of fire on a film and it was expanding as it was when seen by Ritter, the flash time was two seconds or less (R. 72, R. 71, R. 83). This testimony was not denied.

The undisputed record of the standard of conduct of one in Ritter's perilous position appears in Exhibit 110, (R. 47-48), and is concisely stated,

> "The rule, when film is ignited, is: Get out as quickly as you can.
>
> "There is nothing effective to be done, anyway. Film will burn even under water."

The record discloses that these commercial films are made of nitrate and are highly inflammable. Respondent's own witness, a trained projectionist, testified, (R. 40), "I would not know what anybody would do in such a situation."

At the close of the trial Appellant moved for a directed verdict, which was denied. This motion presents the questions for consideration (R. 95-99). After a verdict for plaintiff there was a motion for judgment n.o.v. (R. 116), which was likewise denied.

This case was tried three times in the trial court. The first trial was in October, 1945, when the trial court directed a verdict for the defendant, present Appellant. This was reversed on appeal. See *Hossack v. Metzger*, 156 Fed. 2d 501, where the Court directed the trial court to submit issues to the jury, contrary to what we believe the applicable state law. A second trial was had, resulting in a verdict for the plaintiff and this was set aside on a motion for new trial, by the trial court, on January 31, 1947 (R. 11-12). On amended pleadings there was a third trial which resulted in a verdict for the plaintiff (R. 12). From the judgment entered on said verdict there was an appeal which is now final, so far as the Circuit Court of Appeals is concerned.

QUESTIONS PRESENTED

I.

Whether under the undisputed facts which show the aged,

inexperienced trainee, (alleged co-employee), in a perilous situation not of his or petitioner's creation, who had to act to save his own life on the spur of the moment while holding in his left hand the twelve-pound nitrate inflammable film on a reel, with an expanding spot of fire on the three or four feet of loose end of the film which he was rolling on to the reel and guiding the loose end with his right hand, was negligent, under the South Dakota applicable state Supreme Court decision of Miller v. Stevens, 63 S. D. 10, 256 N. W. 152, and whether the United States Circuit Court of Appeals erred in refusing to follow that decision and erred by adding a qualification that it was for the jury to decide whether he acted as a reasonably prudent man would under such an emergency. The material facts were undisputed.

II.

Whether the Circuit Court of Appeals erred in its first decision (156 Fed. 2d 501), by reversing a directed verdict for petitioner by the District Court, which was based on the Emergency Rule as established in South Dakota, thus in effect compelling the trial court in the last trial to disregard the South Dakota law and submit the question of negligence of one acting in a conceded emergency and who had to act in approximately two seconds, to the jury, even though the actor used his best judgment and was terribly burned in his effort to put out the fire, and even did more than the established standard required. (See Exhibit 110.)

III.

Whether the Circuit Court of Appeals erred in its first and in its last decision by deciding that the question of proximate cause was for the jury, where no negligence was claimed as to the ignition of the film and Ritter's acts or omissions were but incidental and brought about the primary cause, the fire, against which primary cause he only acted to save his own life by acting in effect involuntarily in an effort to extinguish it and throwing or dropping the burning film when he was being burned by a flash fire.

IV.

Whether or not there was any credible evidence in the

last trial that justified the submission of the case to the jury under the South Dakota law, as established by the South Dakota Supreme Court. That is, should the Court have directed a verdict?

V.

Whether not not the Court erred in not entering judment n.o.v. on petitioner's motion, based on the grounds set forth in the motion for a directed verdict.

VI.

Whether on not Ritter was a trainee, in accordance with the opinion of this Court in the case of Walling v. Portland Terminal Co., 67 S. Ct. R. 639, for whose acts petitioner was not liable.

VII.

Whether Ritter, under the facts, owed any duty to decedent that he failed to perform.

VIII.

Whether the decision of the Circuit Court of Appeals destroys the Emergency Rule, as established in South Dakota, and permits juries to gamble and speculate according to their sympathies.

REASONS FOR GRANTING THE WRIT

In this case we have an unusual situation calling for the application of the Sudden Peril or Emergency Rule, as established in South Dakota. Jurisdiction of the Federal Court arises under the diverse citizenship provision of the United States statutes. Since the decision of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, the Federal courts are required to follow the law of the state where the cause of action arose on questions of general law, such as negligence under the emergency rule of the state. Here the Circuit Court of Appeals failed to follow the South Dakota law as announced in *Miller v. Stevens*, 63 S. D. 10, 256 N. W. 152. The rule of law stated in said case by quoting from 20 R. C. L. 29, is as follows:

"The rule judicially stated is that one who in a sud-

> den emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence."

The South Dakota Court further added,

> "It is not material * * * that if he (the actor) had selected the other alternative he might perhaps have been able to stop his car before reaching the intersection or to have passed to the rear of the Johnson car and thus have avoided the accident."

The South Dakota court also approved the rule set forth in Huddy on Automobiles, (8th Ed.), page 359, reading,

> "One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."

In the South Dakota case a jury verdict finding negligence in an emergency was set aside and judgment entered n.o.v. The Circuit Court of Appeals, in its first decision, which it likewise approved in its last decision in this case, qualified the rule by saying of the actor, Ritter,

> "He was confronted by an emergency not caused by his tortious conduct, the standard of conduct required of him still was that of a reasonably prudent man under like circumstances." (See 156 Fed. 2d, page 506 of the opinion, bottom of second column.)

The qualification thus added is not in the South Dakota law, when the emergency is conceded and arising without fault of the actor. In addition, the purported admission of Ritter about tearing the film and stopping the fire is not in the record in the last trial. Besides, in the last trial the evidence shows Ritter's position was such that he only had one hand to use.

In addition, the Court ignored the undisputed evidence that Ritter used his best judgment, thereby ignoring the rule of this Court as announced in *Chesapeake & O. Ry. Co. v. Martin*, 283 U. S. 209, 51 S. Ct. R. 453, on page 455, where there was a motion to direct a verdict, and this Court said,

> "In the consideration of the question, the court * * * is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant."

The opinion disregarded Ritter's testimony that when the spot of fire was seen by him it was spreading, and the other undisputed evidence that when that occurred, the flash time was two seconds. The Court of Appeals thereby created a new rule of emergency law, contrary to the South Dakota law and at variance with decisions in other Federal Circuit Courts of Appeal. That error arose because in the development of a law by judicial decision in a changing world, expressions are sometimes used by text writers and judges applicable only to some given situation, but not applicable to all situations. The rule that a man must act as a reasonable prudent man under like circumstances, and the question of whether he so acted is always a jury question in emergency or sudden peril negligence cases overlooks the foundation and basis of the rule dealing with the mythical character, "a reasonably prudent man." The reasonably prudent man rule requiring submission to the jury of the question of negligence was founded on the theory that all reasonably prudent men act similarly under ordinary circumstances, so that jurors may safely apply their own experience as ordinary prudent men to actions arising under ordinary circumstances. Where the emergency is conceded this qualification of the rule added by the Circuit Court of Appeals cannot with reason possibly apply. The rule itself assumes the actor acting in an emergency must act instinctively and not reasonably, for he has not time to reason.

The rule as just stated its that the actor "is not guilty of negligence if he fails to adopt what subsequenly and upon reflection may appear to have been a better method." In a

changing world, with the advance of science and invention, which requires special knowledge and training in fields that neither judges nor jurors have had any training or experience, to seek to apply the qualification to an emergency act by submitting to the jury the question of negligence of the actor's conduct in a conceded emergency, is in effect to nullify the rule itself, which states, as just quoted, that the actor "is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method."

In addition, jurors having no experience in the emergency thus created have no experience as reasonably prudent men on which to base a judgment of what they or any other reasonably prudent man would do when forced to act instinctively. That is, the qualification added by the Circuit Court of Appeals nullifies the South Dakota rule and actually requires the impossible, so far as jurors are concerned, and permits jurors to gamble and guess on what they would do in an emergency when acting instinctively and without prudence, as we shall more fully point out in our brief submitted herewith.

The importance of the establishment of a sound rule based on reason in emergency alleged negligent cases becomes more and more important since the advent of the industrial, mechanical and scientific age. The necessity of the establishment by the highest court of the land of a rule as a guide for all courts and so men will have knowledge of what is negligence when emergency is conceded and not created by the actor, is now a matter of national importance, and an added reason under the rules of this Court for the granting of the writ.

The second reason is some of the suggested reasons as a ground for the granting of the writ as appear in the Rules of this Court, Rule 38, Subdivision (b) of Subdivision 5, where the decision under consideration is in conflict with another decision of another Circuit Court of Appeals on the same matter, or where the court has decided an important

question of local law in a way probably in conflict with applicable local decisions.

We call the Court's attention first to such conflict. See *Whicher v. Phinney,* 124 Fed. 2d 929 (1st Cir.). Two questions were involved in this case based on motions for directed verdict. One, emergency rule under New Hampshire law. Second, Did defendants cause the emergency? As to the first, the said Circuit Court of Appeals said (headnote),

> "Under New Hampshire law, in such a short interval of time as two seconds there is opportunity only for instinctive action, and such action, without proof of unfitness to act in an emergency, does not provide a basis for a finding of negligence."

As to the second ground of the motion the court said,

> "We think this question should be answered in the negative."

In the case at bar, it is conceded that an emergency existed and was not created by Ritter. Instinctive action was necessary.

We now turn to other Federal cases not decided by the Circuit Court of Appeals. See *Kataoka v. May Department Stores Co.,* in District Court, (S. D. Cal.), 28 Fed. Supp. 3. In that case there was a motion to dismiss which was granted. The court said,

> "In any event, Goddard and his employee are entitled to the benefit of the rule that no one is guilty of negligence who, in an emergency, does whatever he thinks is necessary, even if he does a foolish thing."

See also *Peterson v. Baltimore & R. Co.,* in District Court, (W. D. Pa.), 73 Fed. Supp. 597, where the headnote states the rule,

> "One cannot be charged with negligence in doing that which his judgment approves or in omitting to do that which he has no time to judge, although such act or

> omission if faulty may be called a mistake, where such person is confronted with a sudden emergency not of his creation."

See other state cases where the same rule has been approved.

Ransom v. Union Dep. Co., 142 Mo. App. 361, 126 S. W. 785.

Post v. Richardson, (Pa.), 116 At. 571, involving action in about five seconds.

Barnhardt v. American Glycerine Company, 113 Kan. 136, 213 Pac. 663, 31 A. L. R. 721.

Donahue v. Kelly, 181 Pa. 93, 59 Am. St. R. 632. This case forms the basis of the rule in R. C. L. approved in South Dakota.

Bozeman vs. Blue's Truck Line, (Ga.), 7 S. E. 2d 412, where the rule is stated,

> "One is not required to exercise the caution, discretion and judgment of an ordinary prudent person when an emergency exists."

In presenting this petition we concede that a jury question may arise where an alleged emergency action is claimed by a defendant. That is, there may be a disputed issue of fact as to whether the actor created the emergency, or even an issue of fact as to whether there was any emergency. That can hardly arise as a justification of the decision of the Circuit Court of Appeals, when the Court said,

> "If it be conceded that the evidence conclusively shows that when Ritter discovered the small spark on that portion of the film not wound on the reel which he held in his hands he was confronted with an emergency not caused by his tortious conduct, the standard of conduct required of him was still that of a reasonably prudent man under like circumstances."

The Court also in the same opinion said,

> "That there was no evidence to support a finding of negligence on the part of appellee (Metzger) in the

construction and maintenance of the projection booth is not important because negligence is not charged in that respect."

As pointed out, the questions involved are of such a character that there are many special and important reasons why the writ should be granted. It is apparent that the decision of the Circuit Court of Appeals not only is at variance with South Dakota law, but at variance with numerous other decisions where conceded emergency action is involved and not created by the actor.

See *Laidlaw v. Sage,* Court of Appeals of New York, 52 N. E. 679, which case reviews most of the questions involved here, including proximate cause. The matter is so well stated that we quote applicable portions from the decision as follows:

> "That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. The rule applicable to such a condition is stated in Moak's Underhill on Torts (page 14), as follows: 'The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily.' It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, * * *. This principle of pressing danger, and an act or omission in its presence, was discussed in the Squib Case (Scott v. Shepherd, 2 W. Bl. 894), * * *. That principle has been many times affirmed by the decisions of the courts of this state as well as others."

We quote further from another part of the opinion,

> "That in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a

verdict for the party producing it, upon whom the onus of proof rests."

We quote further from one of the cases cited therein,

"To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the court upon questions to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced."

The case also deals with proximate cause, which we shall briefly discuss in the annexed brief.

We believe the foregoing present strong reasons for granting the writ of certiorari.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment or decisions of the Circuit Court of Appeals for the Eighth Circuit should be granted.

GEORGE J. DANFORTH,
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Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION

Statement of Case

While there was much evidence at the trial, the vital testimony on questions involved here, in the main, relates to facts occurring in a matter of seconds. The testimony covering such facts is given by only two witnesses. The summary of such testimony with quotations is sufficiently set forth in our petition. We shall amplify it in discussing the Circuit Court of Appeals opinion, particularly with the first opinion of that Court. The reason for the necessity of a discussion of the Court's first opinion is that the District Court was forced, by virtue of that opinion, to deny our motion for directed verdict and for judgment n.o.v. The basis of error now is due to the first opinion of the Circuit Court of Appeals in this case. That opinion was not subject to review in this court at the time it was rendered because there was no final judgment in the case. As it became the basis for the last decision and the basis for the District Court's action in denying our motions, it must necessarily be considered and reviewed in this proceedings. The Circuit Court of Appeals now, without discussion, assumes that there was no difference in the first and second trials. While the first decision was erroneous and contrary to South Dakota law, its application as a basis for the second decision makes it still more erroneous, in view of facts supplied in the second trial that did not appear at the first trial.

The second opinion of the Court, while not yet published, is summarized in the last paragraph of the opinion as follows:

> "Being satisfied that the last trial did not present any substantially different case from that fully considered and decided on the first appeal, we find no good purpose to be served by repetition of discussion of the considerations upon which we concluded on that appeal, and now hold on this one, that it was for the jury to determine whether Ritter was an employee for whose negligence the appellee was responsible and whether Ritter was guilty of negligence which was the proximate

cause of Hancer's death. Our decision that the determination of those issues by the jury in favor of the plaintiff upon a proper trial and under proper instructions would justify judgment for plaintiff is conclusive and dispositive of the case.

"The judgment is affirmed."

Before a discussion of what we believe were erroneous rules of law applied by the Circuit Court of Appeals, we wish to call attention to factual differences in the record, as it existed at the last trial, and in comparison to the first opinion as rendered by the Circuit Court of Appeals. The Circuit Court of Appeals in the first opinion, 156 Fed. 2nd 501, said in reference to the question of Ritter being an employee,

"Moreover, the appellee did not take the stand to deny Ritter's employment. His failure in this respect, without explanation, justifies the inference that his testimony if given would have been favorable to the appellant on this point."

In the record for consideration now, the owner of the theatre, testified as follows, (R. 85),

"Mr. Hancer (decedent) mentioned to me that he had a friend he was teaching and made remarks about his progress and the last time I talked to Mr. Hancer was about a week before the fire. He said the man he was training, it would take two or three weeks before he could tell me anything about his ability as a projectionist. That is all all I knew about Mr. Ritter's connection. I had never approved Mr. Ritter as a projectionist and was not requested to approve."

In addition, Ritter himself clarified the whole situation as to his alleged employment. His testimony again is undisputed (R. 53), reading as follows:

"Mr. Hancer talked to me relative to becoming a projectionist. He talked to me at the service station where

I was working and asked me if I would like to learn the picture business. I told him I would not mind trying. He told me I should talk to Will Jonas. * * * Shortly after that I did see Mr. Will Jonas on the street (R. 54). I told him that Mr. Hancer asked me if I would like to learn the picture business and with his consent I would like to try it, and he said, all right. When I went up there I did see and talk to Mr. Jonas and Mr. Hancer. I averaged going up there four or five times a week. At that time I was carrying on my other work of painting, which I did every day the weather was fit. There were some days when I did not go to the theatre. There was not anyone telling me when I had to come. I would choose my own time. * * * Before this fire I had never seen or talked to Roy Metzger personally. I knew that he lived at Winner. * * * (R. 58). Up to the time of this fire I never received any pay of any kind from Mr. Metzger or from the theatre and since the fire I have never received any pay of any kind or character from Mr. Metzger or the theatre. Mr. Metzger never presented me with anything. I wasn't never approved. * * * (R. 59). In my talks with Mr. Hancer or Mr. Jonas, I was told that I had to be approved by Mr. Metzger before I took over the job. Mr. Hancer told me that, too."

In the opinion referred to, the Circuit Court of Appeals said,

> "Ritter admits that if he had torn off the loose end of the film when Mrs. Hancer said, 'The film is on fire. Tear it off', the fire would have been stopped, etc."

There is not a word in the record now of any such evidence given by Ritter.

The Circuit Court of Appeals said in its first opinion, referring to the tearing of the film,

> "There is some evidence, however, that the operation was one easily and quickly performed within the time at his disposal and it cannot be held as a matter of law that there was no negligence on his part."

In view of that statement by the Court and the disregard by the Court of the Emergency Rule, petitioner herein felt it necessary to bring to the attention of the trial court in the last trial undisputed evidence of chemists and others who conducted experiments in the burning of commercial moving picture films timed with stop watches, to determine the flash time of a spreading or expanding fire spot such as existed when seen by Ritter. Parties not interested in this case testified (R. 66 and 68). This might be summarized in the language of one witness (R.83),

> "The time is hardly timeable. It goes so fast. The maximum time would be about a second and a half or two seconds."

This testimony was never denied. It is true the record shows testimony produced by respondent of certain projectionists. None had ever conducted any timing experiments and in the main, their testimony was not different. Even on interrogation by the trial court of one of respondent's witnesses, we have the following (R. 51),

> "The flash stage is something that is purely a guess or gamble, is it?
>
> "A. That is right. Something you and I don't know anything about. It just takes off."

See also for trial court's inquiry, (R. 49).

Even one of respondent's witnesses testified (R. 40), referring to a situation such as existed, when Ritter's attention was called to the red spot of fire on the film,

> "I would not know what anybody would do in such a situation."

Not one of respondent's witnesses had ever been in the situation Ritter was in or had ever timed the flash time of a film. All agreed as stated by one of respondent's witnesses, "Any film fire would be dangerous" (R. 37).

In order to supply any deficiency in evidence, if there was any at the first trial, as to standard of conduct of one

in Ritter's position, we introduced into the record a standard of conduct. See Exhibit 110 (R. 47-48). This standard as announced in said exhibit had the approval of all witnesses. The rule states,

> "Burning nitrate is dangerous. * * * The rule, when film is ignited, is: Get out as quickly as you can! There is nothing effective to be done anyway." (Society of Moving Picture Engineers.)

While the foregoing vital differences existed between the first and last trials, the Circuit Court of Appeals refused to discuss the differences, probably upon the theory announced in its first decision, which, in realistic effect, is that every emergency negligence case presents a question of fact for the jury to decide as to whether or not the emergency actor acted as a reasonably prudent person would act under like circumstances. In the petition we have referred to the rule stated by the Circuit Court of Appeals. We again quote therefrom,

> "If it be conceded that the evidence conclusively shows that when Ritter discovered the small spark on that portion of the film not wound on the reel which he held in his hands he was confronted with an emergency not caused by his tortious conduct, the standard of conduct required of him was still that of a reasonably prudent man under like circumstances."

We further quote from the same opinion the following, so as to clarify the issues and questions presented by our petition, where the court said,

> "That there was no evidence to support a finding of negligence on the part of appellee in the construction and maintenance of the projection booth is not important because negligence is not charged in that respect."

From the foregoing quotations the question and issues here are simplified. In the first instance, at least, we are not concerned with the cause of the fire because petitioner, either by himself or his servants, is not charged with being respon-

sible for the fire existing. The Circuit Court of Appeals has so assumed. On the question of negligence it then leaves a law question for determination as to what is negligence in an emergency case, with the emergency conceded and the actor not creating the emergency.

In addition, of course, we have the question of proximate cause as a question of law under the conceded facts. All these questions were presented and preserved by the motions for direction of verdict and judgment n.o.v., appearing in Record 95, 99 and 116.

SPECIFICATIONS OF ERROR TO BE URGED

The assignments of error for consideration here briefly are as follows:

I.

The Circuit Court of Appeals erred in its decision in following the rule of law that it had first announced in this case in 156 Fed. 2d 501, and by so doing establishing a rule of law contrary to the established rule of law in emergency cases in the State of South Dakota.

II.

The Circuit Court of Appeals likewise erred in establishing by its decision or decisions a rule of law at variance with a decision in another Circuit Court of Appeals.

III.

The Circuit Court of Appeals erred in establishing a rule of law at variance with previous decisions of this Court on the question of proximate cause.

IV.

The Circuit Court of Appeals erred in establishing a rule of law at variance with the basic rule applicable to emergency negligence cases, thereby in effect destroying the basic applicable principles of law underlying the very existence of the rule and leaving every such case an issue of fact for a jury, and depriving trial courts of their right and duty to afford litigants the protection and guarantee that the law affords against gamble and speculation by juries moved by sympathy.

V.

The Circuit Court of Appeals erred because the evidence was insufficient to justify the submission to the jury the question of negligence; the question of proximate cause, and Ritter's status as a trainee.

We shall confine our further discussion to these questions, omitting as far as possible duplication of citations and quotations appearing in the petition. Some were added in the petition because of our view that it would be helpful to the Court to grasp quickly the reasons for the granting of the petition and the public importance of an opinion by this Court on the questions thus involved.

LAW QUESTIONS PRESENTED

There are three important law questions involved in this application:

(a) What generally is the Emergency Rule, and the application of the Emergency Rule in South Dakota?

(b) The application of the rule of proximate cause as defined by this Court and other courts.

(c) The application of the rule of law as established by this Court to Ritter's status as an alleged co-employee.

We shall discuss these matters in the order named.

EMERGENCY OR SUDDEN PERIL RULE

By virtue of the Circuit Court of Appeals statement in its first opinion to the general effect that it may be conceded that Ritter "was confronted with an emergency not caused by his tortious conduct, the standard of conduct required of him was still that of a reasonably prudent man under like circumstances," and then the concluding statement that the questions for the jury, we have the discussion as to the emergency rule confined to the statement that "the standard of conduct required of him was still that of a reasonably prudent man under like circumstances," which is for the jury to determine. We need not discuss emergency or negligence in the creation of an emergency, so far as this case is concerned,

only so far as it shows the fallacy of the standard above added by the Circuit Court of Appeals. We of course should know the basis of the rule and how it came into existence.

In our petition we have set forth certain statements of the rule and the basis and reasons for its origin. It came into existence, based upon the well known knowledge that men in sudden peril act without reason, act instinctively and involuntarily. From virtually all the decisions of the courts we find the underlying thought is of action without reason or judgment.

In the cited cases in our petition, we find in the Courts' statements heretofore quoted and herein repeated, as follows:

> "In any event Goddard and his employees are entitled to the benefit of the rule that no one is guilty of negligence who, in an emergency, does whatever he thinks is necessary, even if he does a foolish thing." (*Kataoka v. May Department Stores,* in District Court, S. D. Cal., 28 Fed. Supp. 3).

> "One is not required to exercise the caution, discretion and judgment of an ordinarily prudent person when an emergency exists." *Bozeman v. Blue's Truck Line* (Ga.) 7 S. E. (2) 412.

In two of the cases cited in our petition and referred to, the time for the actor to act varied from two seconds to five seconds.

The South Dakota rule is clearly set forth in *Miller v. Stevens,* appearing in our petition. It is predicated upon the text of R.C.L. The text is predicated upon the cases of *Donahue v. Kelly,* 181 Pac. 93, 59 Am. St. R. 632. The South Dakota Court also added to the statement appearing in R.C.L. what appears in the discussion in 38 Am. Jur. 686, Section 41, reading,

> "The fact that injurious consequences might have been avoided had he selected another course of action does not charge him with negligence."

This is important, because that portion of the text using the language just set forth, is supported only by the South Dakota case, *Miller v. Stevens.*

It is likewise interesting to note that the author of the text, in American Jurisprudence, added an apparent qualification to the rule stated in R.C.L., using these words,

> "Provided he exercised in the emergency the care of a reasonably prudent individual under like circumstances."

This latter statement is a qualification of the original rule in R.C.L.. This may have formed the basis for the statement by the Circuit Court of Appeals to the effect that the standard of conduct required of an emergency actor, without fault for the emergency, was that of a reasonably prudent man under like circumstances, thus leaving the question to a jury. The very statement of the rule and its foundation shows the fallacy of such reasoning. The strange thing is that the author of American Jurisprudence cites two cases only in Note 12 as the basis for his text statement. The cases cited are *Scarpelli v. Portland Electric Power Co.,* 130 Ore. 267, 278 P. 99, and *Jones v. Hanbury,* 158 Va. 842, 164 S. E. 545. A reading of both of said cases discloses that while some words did appear in the opinion in regard to the conduct of a reasonably prudent man under like circumstances, the actual ruling in both cases were in accord with the South Dakota rule. In fact, on appeal in both cases, jury verdicts were set aside and judgments directed to be entered for the defendants.

We ask the Court to read particularly the Virginia case. It gave recognition to two important factors. First, that in cases like this, plaintiff must always establish negligence. Second, that the burden of proof in so doing is on plaintiff. The effect of the holding of the court and the language used is that the question is one for the Court, if the emergency was conceded and not created by the actor: That if there was any doubt in the mind of the court as to how a man of ordinary prudence would act in an emergency, then the evidence failed to establish negligence, with no jury question presented.

Once we concede that the emergency existed, not created by the actor, and likewise concede that the rule is as stated in many cases, that the actor is not required to exercise the care, caution and discretion of an ordinary prudent person when an emergency exists, or that the actor under such circumstances is not guilty of negligence when he does whatever he thinks is necessary, even if he does a foolish thing, the fallacy of the decision of the Circuit Court of Appeals is apparent. All we have to do is to make personal inquiry of ourselves of what we would do, assuming that we were the actor; that we had never seen torn or torn a moving pitcure nitrate film; had never seen such a film with an expanding spot of fire thereon; that at the time we saw the expanding spot we were engaged in work that demanded our entire attention; that we were holding a twelve-pound reel and a film in our left hand, drawing the loose end of the film through our right hand—what would we have done in such a situation in a matter of five seconds or less? Would we be certain what we would have done? Assuming likewise that all the actor has to do is to use his best judgment, and the actor is not required to exercise the discretion and judgment of an ordinarily prudent person, what, then, was there left to submit to a jury in regard to the actor's conduct?

It is not the possibilities of what the emergency actor could have done, but certainty of action and result that plaintiff must prove before a jury question is presented, under the emergency rule. Under this rule, to use the language of the Virginia court, (supra),

> "If the evidence leaves it in doubt as to whether a man of ordinary prudence might have so chosen or acted, it fails as a matter of law to establish that he was guilty of negligence."

See also *International & G. N. R. Co. vs. Neff*, (Tex.), 28 S. W. 283, where the court discussed a qualification like the one added by the Circuit Court of Appeals and used this language:

"This qualification we believe to be useless, if not in fact calculated to confuse the jury when expressed in a charge. If one placed in imminent peril by the negligence of another is required to act with care and prudence, then the imprudent man, who is easily alarmed, is not protected at all under that state of case. It is a fact, as well known as any other connected with the subject of ordinary care, that a man of prudence, under such conditions, may at one time act wisely, and at another, being terrified by the sudden danger, will do things that could not be attributed to a person of ordinary prudence, because at the time, under the influence of fear, he is not a prudent person, being deprived of his presence of mind by the perils of his situation. If it be said that a man of ordinary prudence could not be expected to exercise care under these conditions, then there is no need to use the qualifying words, because they do not express any duty resting upon the imperiled person." (See page 285.)

See also *Laidlaw v. Sage*, (N. Y.), 52 N. E. 679, where the court gives the origin of the rule and its application, and in the general discussion of the case states,

"A mere conjecture, built upon a bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another. * * *

"To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights."

The Circuit Court of Appeals likewise disregarded the South Dakota law, as set forth in *Ulrikson v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 64 S. D. 476, 286 N. W. 369. In that case a passenger in an automobile was held negligent as a matter of law, where an accident happened at an intersection with only seconds for the actor to do something. The South Dakota court pointed out that it was the duty of the court, under such an emergency situation, to

recognize a definite standard of conduct. The court quoted with approval from the work of late Justice Holmes, entitled, "The Common Law," pages 110, the following:

> "The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion."

Also, the following from the same work,

> "It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one; etc."

Also,

> "If in the whole department of unintentional wrongs the court arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the Defendant to know, and would assert, by implication, that n o t h i n g could be learned by experience."

In the same opinion, the South Dakota court also quoted from another of the late members of this Court, Judge Cardozo, as follows:

> "There should be at least some degree of correspondence between the standards of conduct to be established by the courts and the realities of life."

We of course feel that it is laudible of courts, under our system of jurisprudence, to submit to juries disputed issues of fact where the jury has some basis for intelligent action. It is also as much a fixed principle of law under our system of jurisprudence that the trial court is in duty bound to direct a verdict against the party having the burden of proof, if the jury can only gamble and speculate upon possibilities. It certainly is not the law in South Dakota and is not the law now, as expressed by this Court, that the court and the jury

is not required to accept the testimony of uncontradicted witnesses.

We heretofore cited in our petition, *Chesapeake & Ohio Ry. Co. vs. Martin,* 283 U. S. 209, 51 S. Ct. R. 453, the rule in this Court. The author of the first opinion in this case, in the Circuit Court of Appeals injected the following statement in the opinion:

> "The jury was not required to accept the testimony of Jonas and Ritter to the probable origin of the fire, even if this testimony could be said to be uncontradicted."

The rule thus set forth, coupled with the rule applied in an emergency action, has the direct effect of depriving a litigant of the effect of the safeguards which our system of jurisprudence affords, which require the court to determine under such a record as this the question of negligence in a conceded emergency not created by an actor, under the standard of conduct announced in the rule itself. This rule is for the protection of society, under our system of government, as a safeguard against taking one man's property and transferring it to another, where the party whose property is being taken was guilty of no negligence, under the emergency law. To use Justice Holmes' words, "The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion."

To adopt a rule of law such as announced by the Circuit Court of Appeals in emergency cases would be a confession of weakness upon the part of the court, or to use Justice Holmes' words, "To state a very large part of the law which they required the defendant to know." That is, the court would be requiring a defendant to know what the court itself did not know and require a jury to know the impossible and gamble and speculate in a field which even experts concede is in the field of gamble and guess. Such a rule would place the onus upon a defendant in emergency cases and require him to prove by a preponderance of evidence the impossible.

We cannot cite and quote from all the cases arising under the emergency rule. The majority of such recent cases arise

in automobile intersection accident cases where two factors are not conceded, (a) the existence of the emergency; (b) the actor's tortious conduct in creating the emergency. The evidence is also disputed on both such factors. In such cases a jury question is presented.

The second general group is fire and explosion cases, similar to the case at bar, where the emergency is obvious and not created by the actor. In this class of cases the overwhelming authority is to the effect that no jury question is presented. This is predicated on the theory that the actor must act instinctively and involuntarily, and in so doing, is not expected to act with prudence or with reason, but may act foolishly and not according to any standard of conduct. There is the further factor that the burden of proof to establish negligence is always on the plaintiff, and that in this class of cases neither court nor jury can decide the impossible when instinctive action under peril is to be judged. Neither judge nor jury has any experience under similar facts on which to form a judgment. A plaintiff fails therefore to establish negligence.

The rule is illustrated by such cases as *Barnhardt v. American Glycerine Co.,* 113 Kan. 136, 213 Pac. 663, 31 A. L. R. 721, and the cases cited therein, which include the leading case of *Donahue v. Kelly,* 181 Pa. 93, 59 Am. St. R. 632, 37 Atl. 186. This latter case is a leading case which forms the basis of the rule in Ruling Case Law and the rule in South Dakota.

There are no decisions involving fires or explosions arising out of a conceded emergency (not created by the actor, and where the actor acted according to his best judgment in the space of seconds) where the Courts have held that a jury question was presented, or where the Courts have added the qualification that appears in the decision of the Circuit Court of Appeals. The importance of a review by this Court is apparent. It is apparent that the error was a misconception of the basis of the rule and the failure to apply the South Dakota rule. The decision of the court is in conflict with other Federal cases hereinbefore cited in our petition. All reasons exist for granting our petition.

PROXIMATE CAUSE

The Circuit Court of Appeals likewise erred in refusing to follow the rule of proximate cause in fire and explosion cases, as established by the Supreme Court of the State of South Dakota and by this Court.

See *Froke v. Watertown Gas Co.*, 68 S. D. 69, 298 N. W. 450. This was an action for damages caused by a leakage of gas followed by an explosion. The plaintiff was badly burned and otherwise injured. There was a trial to a jury with a verdict for the plaintiff. On appeal this judgment was reversed. There were various acts of commission or omission charged. The South Dakota Supreme Court said,

> "Whether or not either of these acts or omissions constituted negligence on the part of the defendant is not material, for it is not shown or claimed that either of such acts or omissions was the proximate cause of the explosion. * * * To render the defendant liable for damages some negligent act on the part of the defendant must be shown to be the proximate cause of the injury."

It is clear here that no negligence is claimed because of the fire on the film. Whatever Ritter did or failed to do were purely incidental acts brought about by the fire for which no responsibility is claimed. Under the authorities cited, the attempt in a space of seconds or fraction of seconds to put out the fire, under the emergency rule established in South Dakota, is not negligence. Neither would his act while being burned by the fire in throwing the film be negligence. The proximate cause was the fire. Without the fire there would be no occasion for omission or commission of acts by Ritter and there would have been no death by fire of decedent. The South Dakota rule was not observed by the Circuit Court of Appeals. If observed, it would have required a return of the case to the trial court to enter judgment n.o.v., as the trial court did at the first trial.

The Circuit Court of Appeals likewise refused to follow

the rule adopted by this Court. See *Aetna Insurance Co. v. Boon,* 95 U. S. 117, 24 L. Ed. 395, where this Court said,

> "The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes."

See likewise *Barnhardt v. American Glycerine Co.,* heretofore cited, and *Owen v. Cook,* 9 N. D. 134, 47 L. R. A. 646, 81 N. W. 285. This presents another added important reason within the rules of this Court why this petition should be granted.

WAS RITTER A TRAINEE FOR WHOSE ACTS THE PETITIONER WAS NOT RESPONSIBLE?

The South Dakota rule was announced in Morman v. Wagner, 63 S. D. 547, 262 N. W. 78, where the court said,

> "Where liability is sought to be fastened on the master on the principle of respondeat superior, relation of master and servant must exist."

The South Dakota court quoted with approval the following:

> "The rule respondeat superior operates only in respect of cases in which it is established by affirmative testimony that at the time when the given tort was committed the relationship of master and servant, or of principal and agent, existed."

Here, at the time of the fire Ritter was performing some of decedent Hancer's duties under Hancer's direction for Hancer's benefit. Ritter had been selected by decedent to train, so when approved by the petitioner he might possibly have a job as projectionist.

The Circuit Court of Appeals disregarded the decision of this Court in *Walling v. Portland Terminal Co.,* 67 S. Ct. R. 639, where this Court said, dealing with the Fair Labor Standards Act,

"But broad as they are, they cannot be interpreted so as to make a person whose work serves his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses * * * in public or private vocational schools, it could not be suggested that they were employees of the school."

See also *Walling v. Nashville C. & St. L. Railway*, 67 S. Ct. R. 644, from which we quote the headnote,

"Where persons in order to qualify for employment by railroad as fireman, brakeman and switchman voluntarily trained * * * under direct supervision of regular employee doing same type of work, but were under no obligation to do any work or accept employment, and railroad gained nothing from their work, * * * except possibility of a future employee, such trainees were not employees."

SUMMARY

There are important and urgent reasons for granting of the writ.

It is necessary:

First, to preserve the law as established by this Court, that Federal Courts, where jurisdiction is acquired by diverse citizenship, follow the decisions of the state court where the cause of action arose so that residents of that state all may have their rights or liabilities determined by the same standard.

Second, to prevent a conflict in the decisions of the various Circuit Courts of Appeals as to what the emergency rule is, when the emergency is conceded and not created by the actor, in negligence cases.

Third, to prevent further confusion and misconception of the emergency rule by this Court defining and applying the law on the basis of the reasons for the rule. By so doing, the

Court will render a great service to every inferior court, to the public and every citizen. It will prevent a man's life savings from being swept away solely on the basis of sympathy of jurors acting entirely without possible knowledge, and acting solely on the basis of speculation, gamble and guess. This Court will likewise preserve in trial courts the inherent right and duty to protect a litigant and preserve a safeguard intended for the protection of his rights.

This case has been tried three times; the trial judge directed a verdict the first time and granted a new trial the second, clearly indicating the trial judge's adherence to the South Dakota law, as laid down in *Stevens v. Miller,* supra. The decision of the Circuit Court of Appeals adopts an entirely erroneous contention that Ritter may have saved the situation, if he had done something else than he did. In effect, the Circuit Court of Appeals has added a qualification of the whole rule of sudden emergency and entirely overlooks the fact that the whole rule of sudden emergency is based upon the fact that the person in question must act without either foresight or hindsight.

We respectfully urge that the Writ be granted.

Respectfully submitted,

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